

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SAID A. OMAR

Claimant

VS.

TYSON FRESH MEATS, INC.

Self-Insured Respondent

Docket No. 1,035,559

ORDER

Claimant requested review of the September 8, 2011 Post Award Medical Order by Administrative Law Judge Brad E. Avery. This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for the claimant. Gregory D. Worth of Kansas City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the post award hearing transcript dated September 2, 2011.

ISSUES

Claimant sought post award relief seeking airfare, lodging as well as expenses for a traveling companion to travel from Minnesota to El Dorado, Kansas, for scheduled left shoulder surgery. Claimant further requested that a physician in Minneapolis, Minnesota, be authorized to provide the medical treatment. Respondent agreed to provide mileage and lodging expenses pursuant to the statutory requirements and further offered to provide medical personnel to assist claimant after the surgery.

The Administrative Law Judge (ALJ) ordered respondent to pay for the following: (1) mileage and medical for claimant's trip to El Dorado; (2) medical personnel to attend while claimant is in El Dorado; and, (3) transportation from Wichita to El Dorado.

Claimant requests review of whether the ALJ erred: (1) by not directing respondent to seek medical treatment for the claimant in his home town of Minneapolis, Minnesota; (2) by not ordering respondent to pay all costs of the hotel and out-of-pocket expenses for surgery in El Dorado, Kansas; (3) by not paying travel expenses, per diem and plane fare; and, (4) for making claimant travel by bus over 600 miles one way and then returning home a day after surgery.

Respondent argues the Board does not have jurisdiction to review this appeal from a post-award preliminary hearing. In the alternative, respondent argues the ALJ's Post Award Medical Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

At the post award hearing the attorneys made arguments without any testimony from claimant. Claimant now resides in Minnesota and was scheduled for shoulder surgery in El Dorado, Kansas. Claimant has repeatedly requested that this surgery be performed in Minneapolis, Minnesota, where claimant currently resides.

Claimant sought post award benefits seeking payment of the motel costs for three days, a taxi from the airport and a nurse. Respondent has agreed to provide a nurse or an attendant after claimant is discharged from the hospital following his surgery. But respondent argued: "The claimant is entitled to what is provided for by statute and what's provided by statute is very clear, it is mileage and per diem. That section pertaining to per diem specifically indicates it is intended to defray the cost of food and lodging on a journey such as this."¹

Respondent advised the ALJ that a check in the amount of \$700 had been mailed to claimant's attorney. This amount is 4 days of per diem at \$15 a day and the remaining \$640 for mileage. A bus ticket from Minneapolis, Minnesota, to Wichita, Kansas, would cost approximately \$228. Respondent agreed to provide transportation from the Wichita bus station to El Dorado for his appointment.

Initially, respondent argues that the Board does not have jurisdiction to address this matter as it is a post award proceeding for medical treatment pursuant to the preliminary hearing statute. At the post-award hearing the parties agreed that the matter be treated as a preliminary hearing request. The following colloquy occurred:

¹ P.A.H. Trans. 6-7.

MR. WORTH: We would ask that the Court consider this in the same manner as a preliminary hearing request.

JUDGE AVERY: All right. It will be dealt with in the same manner.

MR. AUSEMUS: And I would join in that, Your Honor, and request that the Court immediately enter an order that I can present to my client.²

The ALJ's Post Award Medical Order specifically noted:

Now on this 2nd day of September, 2011, the *claimant's Application for Preliminary Hearing* comes on for hearing before the Administrative Law Judge for the Division of Workers Compensation of the State of Kansas. (Emphasis Added.)

Because the parties elected to proceed to a hearing before the ALJ utilizing the procedure under K.S.A. 44-534a instead of the preferred procedure for litigating post award medical provided in K.S.A. 2010 Supp. 44-510k, this appeal is not an appeal from a final order.³ Accordingly, the Board's jurisdiction is limited and this appeal will be heard and decided by a single Board Member as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A) as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁴

This is an appeal from a preliminary hearing order and not every alleged error is subject to review. The Workers Compensation Act gives this Board specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are: (1) did the worker sustain an accidental injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide the employer with timely notice and with timely written claim; and, (4) do certain other defenses apply. And the term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.⁵ Moreover, the Board can review preliminary hearing orders in which an ALJ is alleged to have exceeded his or her jurisdiction.⁶

The issue of whether a worker is entitled to expenses for seeking medical treatment and where the treatment will be provided is not a jurisdictional issue listed in K.S.A. 44-

² P.A.H. Trans. at 2.

³ *Siler v. U.S.D. No. 512*, 45 Kan. App.2d 586, 251 P.3d 92 (2011)

⁴ See K.S.A. 2010 Supp. 44-555c(k).

⁵ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁶ K.S.A. 44-551(b)(2)(A).

534a that is subject to review from a preliminary hearing order. That is an issue over which an ALJ has the sole authority and jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁷

This Board Member finds that the ALJ did have the jurisdiction at the preliminary hearing to decide claimant's entitlement to medical travel and lodging expenses as well as where the treatment would be provided and that the Board does not have jurisdiction to consider that issue at this time. The claimant's appeal is, therefore, dismissed.

In this case the parties elected not to proceed under K.S.A. 44-510k which is the preferred statutory procedure created to cover or address disputes about or concerning post-award medical treatment. The statutory procedure provided by K.S.A. 44-510k avoids the jurisdictional issues that arose in *Siler v. U.S.D. No. 512*, 45 Kan. App.2d 586, 251 P.3d 92 (2011), regarding appeal from an order that followed the preliminary hearing procedure, and eliminates the necessity of multiple proceedings in order to obtain an appealable final decision. Moreover, in spite of the incorrect statement in the body of the decision in *Siler*, (that the preliminary hearing procedure in K.S.A. 44-534a is the only statutory method available for disputes regarding future medical treatment.) K.S.A. 44-510k is a statutory method, other than K.S.A. 44-534a, that was created to cover disputes regarding ongoing and future medical treatment. And a recent statutory amendment has clarified that claimant, respondent and insurance carriers can utilize K.S.A. 44-510k, the preferred procedural method.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁹

AWARD

WHEREFORE, it is the decision of this Board Member that claimant's appeal is dismissed and the Post Award Medical Order of Administrative Law Judge Brad E. Avery dated September 8, 2011, remains in full force and effect.

⁷ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁸ K.S.A. 44-534a.

⁹ K.S.A. 2010 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge